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 10
 11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA

13 COYNESS L. ENNIX, JR., M.D.,

14 Plaintiff,

v.

15 ALTA BATES SUMMIT MEDICAL
 16 CENTER,

17 Defendant.

CASE NO. C 07-2486 WHA

**[PROPOSED] ORDER
 GRANTING DEFENDANTS'
 MOTION FOR SUMMARY
 JUDGMENT**

DATE: April 3, 2008
TIME: 8:00 a.m.
DEPT: Ctrm. 9, 19th Flr.
JUDGE: Hon. William H. Alsup

COMPLAINT FILED: May 9, 2007
TRIAL DATE: No date set.

19 The motion for summary judgment on the Complaint of Plaintiff Coyness L.
 20 Ennix, Jr., M.D., ("Plaintiff") pursuant to Fed. R. Civ. P. 56 filed by Defendant Alta Bates
 21 Summit Medical Center (the "Medical Center") came on for hearing on April 3, 2008, at
 22 8:00 a.m., before this Court, the Honorable William H. Alsup presiding. Maureen E.
 23 McClain and Alex Hernaez, Kauff, McClain & McGuire LLP, appeared as attorneys for
 24 the Defendant and G. Scott Emblidge and Andrew E. Sweet of Moscone, Emblidge and
 25 Quadra, LLP, appeared as attorneys for Plaintiff.

26 After full consideration of the parties' papers, as well as the argument of
 27 counsel, the Court finds that there is no material dispute of fact concerning Plaintiff's
 28

1 race discrimination claim arising under 42 U.S.C. § 1981 (the sole remaining claim in the
 2 lawsuit) and therefore that summary judgment is proper.

3 **A. SUMMARY JUDGMENT STANDARDS.**

4 On its motion for summary judgment, ABSMC bears the initial burden of
 5 demonstrating the absence of a genuine issue of material fact. See *Anderson v. Liberty*
 6 *Lobby, Inc.*, 477 U.S. 242, 256 (1986). It need not disprove Plaintiff's case, however.
 7 See *Celotex Corporation v. Catrett*, 477 U.S. 317, 325 (1986). If ABSMC meets its initial
 8 burden, then Plaintiff "may not rely merely on allegations or denials in [his] own pleading;
 9 rather, [Plaintiff's] response must--by affidavits or as otherwise provided in this rule--set
 10 out specific facts showing a genuine issue for trial. If [he] does not so respond, summary
 11 judgment should, if appropriate, be entered against that party." See Fed. R. Civ. P.
 12 56(e).

13 Moreover, Plaintiff "must do more than simply show that there is some
 14 metaphysical doubt as to the material facts. Where the record taken as a whole could
 15 not lead a rational trier of fact to find for [Plaintiff], there is no 'genuine issue for trial.'" See
 16 *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87
 17 (1986). Summary judgment is "properly regarded not as a disfavored procedural
 18 shortcut, but rather as an integral part of the Federal Rules as a whole, which are
 19 designed 'to secure the just, speedy and inexpensive determination of every action.'" See
 20 *Celotex*, 477 U.S. at 327. "[T]he mere existence of a scintilla of evidence" is
 21 insufficient to create a genuine issue of material fact. See *Anderson*, 477 U.S. at 252.

22 **B. Plaintiff Has Not Established a Prima Facie Case of Race**
 23 **Discrimination Under § 1981 and the Burden Shifting Analysis of**
McDonnell Douglas Corp. v. Green.

24 In evaluating disparate treatment claims under § 1981, the Court applies
 25 the analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See
 26 *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 850 (9th Cir. 2004). The
 27 applicable test under *McDonnell Douglas* is as follows:

28 A plaintiff must first establish a *prima facie* case of

1 discrimination. If the plaintiff establishes a *prima facie* case,
 2 the burden then shifts to the defendant to articulate a
 3 legitimate nondiscriminatory reason for its employment
 4 decision. Then, in order to prevail, the plaintiff must
 5 demonstrate that the employer's alleged reason for the
 6 adverse employment decision is a pretext for a discriminatory
 7 motive.

8 *Green*, 411 U.S. at 802-05. “[P]roof of intent to discriminate is necessary to establish a
 9 violation” of Section 1981. *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1438 (9th
 10 Cir. 1984) (emphasis added). Here, Plaintiff's claim fails because he cannot establish a
 11 *prima facie* case of race discrimination.

12 In order to establish his *prima facie* case, Plaintiff was required to offer
 13 giving “rise to an inference of unlawful discrimination.” See *Yartzoff v. Thomas*, 809 F.
 14 2d 1371, 1374 (9th Cir. 1987). The failure to show “specific facts” that establish a *prima*
 15 *facie* case warrants a summary judgment order. *Id.* at 1374; see also *Palmer v. United*
 16 *States*, 794 F.2d 534, 536-39 (9th Cir. 1986). During his deposition, Plaintiff conceded
 17 that he has no direct evidence of discriminatory intent by any of the now-dismissed
 18 individual defendants:

19 Q. Is it correct, then, that none of the defendants ever
 20 said anything to you which was disparaging of your
 race?

21 A. Of course not. I just told you that these are highly
 intelligent people. Of course not.

22 Plaintiff Tr. at 106:6-10.

23 Plaintiff also conceded that he has no evidence as to whether any of the
 24 non-defendant members of the February 8, 2005 MEC “had a racial bone in his [or her]
 25 body,” which was defined by Ennix to mean having “any racial animus against African
 26 Americans.” See Plaintiff Tr. at 339:12-25. Specifically, when asked whether any non-
 27 defendant member of the February 8, 2005 MEC harbored any racial animus against
 28

1 African Americans, Plaintiff answered either "no," "probably not" or "I don't know" as to
 2 each member. See Plaintiff Tr. at 325:12-327:18.

3 And, as to the members of the February 8, 2005 MEC who are also
 4 defendants (i.e., William Isenberg, Leigh Iverson and Steven Stanton), Plaintiff made
 5 equally important concessions:

6 Q. Aside from the fact that Dr. Isenberg participated in the
 7 peer review process that you globally believed to have
 8 been discriminatory, do you have any basis for
 believing that Dr. Isenberg has a racial bone in his
 body?

9 A. I don't know.

10 See Plaintiff Tr. at 328:1-6.

11 Q. Aside from the facts that you believe Dr. Iverson
 12 participated in a peer review process which you
 13 globally believe to have had aspects of racial
 discrimination, do you have any factual evidence that
 Dr. Iverson has a racial bone in his body?

14 A. Tough to say.

15 Q. That's your answer?

16 A. That's my answer.

17 See Plaintiff Tr. at 328:16-24.

18 Q. Aside from participating in a peer review process
 19 which you globally believe had some aspects of racial
 20 discrimination, do you have any factual basis for
 saying that Dr. Steve Stanton has a racial bone in his
 body?

21 A. I suspect that he has.

22 Q. Give me one factual basis for that suspicion?

23 A. I can't give you any.

24 See Plaintiff Tr. at 329:17-25.

25 These concessions preclude Plaintiff from establishing a prima facie case
 26 of discrimination under Section 1981. Plaintiff's mere belief that discrimination occurred,
 27 without specific supporting facts, is insufficient to avoid summary judgment. This rule
 28 has been unequivocally stated by the Ninth Circuit:

1 A plaintiff's belief that a defendant acted from an unlawful
 2 motive, without evidence supporting that belief, is no more
 3 than speculation or unfounded accusation about whether the
 4 defendant really did act from an unlawful motive. To be
 5 cognizable on summary judgment, evidence **must** be
 6 competent.

7 *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001)
 8 (emphasis added); see also *Lindsey v. Shalmy*, 29 F.3d 1382, 1385 (9th Cir. 1994)
 9 ("Mere conclusory assertions of discriminatory intent, embodied in affidavits or
 10 deposition testimony, cannot be sufficient to avert summary judgment."); *Hansen v.*
 11 *United States*, 7 F.3d 137, 138 (9th Cir. 1993) ("When the nonmoving party relies only
 12 on its own affidavits to oppose summary judgment, it cannot rely on conclusory
 13 allegations unsupported by factual data to create an issue of material fact.").

14 Based upon the foregoing, the Court finds that Plaintiff has not established
 15 a *prima facie* case of discrimination under Section 1981. Defendant's request for a
 16 Summary Judgment order is **GRANTED** and the Complaint is **DISMISSED WITH**
 17 **PREJUDICE**.

18 C. **ABSMC Is Entitled To An Award Of Attorneys' Fees.**

19 Pursuant to 42 U.S.C. § 1988, a party prevailing in a cause of action
 20 arising under, *inter alia*, § 1981 may be awarded reasonable attorneys' fees. See *Staton*
 21 *v. Boeing Co.*, 327 F.3d 938, 966 (9th Cir. 2003). The Court finds that fees are
 22 appropriate here. Accordingly, Defendant's request for reasonable attorneys' fees is
 23 **GRANTED**.

24 **IT IS SO ORDERED.**

25 DATED: _____

26 4848-2217-7282.1

27 Hon. William H. Alsup
 United States District Court Judge